IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 11 of 2005
With
CIVIL APPLICATION No. 614 of 2005
In
SECOND APPEAL No. 11 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

AMRUTBHAI DHANJIBHAI PATEL - Appellant(s)
Versus
DHYABHAI DHANJIBHAI PATEL & 3 - Defendant(s)

==========

Appearance :

MR NV GANDHI for Appellant(s) : 1,
MR RS SANJANWALA for Defendant(s) : 1 - 2, 4,
NOTICE SERVED BY DS for Defendant(s) : 3,

==========

CORAM : HONOURABLE MR.JUSTICE R.S.GARG

Date : 18/09/2006

ORAL JUDGMENT

1. The appeal was admitted for hearing on 14.9.2006 on the following substantial questions of law:-

    1. Whether on the facts and in the circumstances of the case, the suit of the plaintiffs for injunction simpliciter was maintainable, when according to their own case, they were ousted from the suit premises and the defendant was in exclusive possession?
    2. Whether on the facts and in the circumstances of the case, the plaintiffs were required to file a suit for partition of the entire joint Hindu Family property which could include the property in their possession and the property in possession of the defendant?”

2. The plaintiffs Dahyabhai Dhanjibhai Patel, Dhurjibhai Dhanjibhai Patel and plaintiff no.4 Ranchodbhai Dhanjibhai Patel, and defendant Amrutbhai Dhanjibhai Patel are real brothers, while the plaintiff no.3 Vinodbhai Naginbhai

Patel is nephew of these four brothers.

3. The father of the plaintiffs no.1, 2 and 4 and the grandfather of the plaintiff no.3 died on 8.7.79 leaving behind him some agricultural land. It appears that somewhere in the year 1979, revenue records were corrected and names of five persons were recorded in equal rights.

4. The plaintiffs came to the trial court with a submission that the defendant, somewhere in the year 1989, on the date specifically mentioned in the plaint, restrained them from entering upon survey no. 1086 and this act on the part of the defendant was bad, because, no partition of the joint Hindu family property had ever taken place. It was submitted that the plaintiffs were entitled to enter upon the land and were also entitled to share crop proceeds. When this Court asked the learned counsel for the plaintiff what whether there were land belonging to the parties, he submitted under instructions that some other land which was in possession of the plaintiffs was part and parcel of the other pieces of land for which partition had already

taken place and respective shares were given to the plaintiffs and to the defendant.

5. The defendant, after putting his appearance, submitted the written statement, wherein, he pleaded that there had been a family partition amongst brothers and since after the partition, survey no. 1086 continues to be in his possession as his personal property, while other land has come to the share of the plaintiffs. He submitted that the plaintiffs had come with a false case by concocting cause of action while, in fact, the defendant was in exclusive possession since after the event of the partition.

6. The suit for injunction was also resisted on the ground that as the plaintiffs were not in possession, by grant of injunction, the defendant would be dispossessed and as such, injunction in the form as claimed, could not be granted. After recording the evidence of the parties and hearing them, the learned trial court held that, the plaintiffs had suppressed material facts from the court, they did not

inform the court that though the suit was for survey no. 1086 only, but the parties had other agricultural land also. It also found that the cause of action as pleaded in the plaint in fact, was concocted, it accordingly dismissed the suit. It also held that it was not in dispute between the parties that the defendant was in exclusive possession of the property.

7. Being dissatisfied by the judgment and decree passed by the learned trial court dismissing the suit, the plaintiffs took up the matter in First Appeal. The learned first appellate court observed that as the defendant has failed in proving the partition by metes and bounds, the property would continue to be joint property of all the co-parceners/members of the joint Hindu family and in absence of a partition, everybody would be deemed to be in possession, either joint or constructive and in any case, everybody would be entitled to enjoy the joint family property. The first appellate court did not look into the accrual of the cause of action and the grounds on which the suit was dismissed. It

also did not consider the effect of the fact that whether in absence of a cause of action, could a suit be filed nor it looked into the fact that grant of injunction would tantamount to dispossessing the defendant nor it looked into the effect of the fact that if the cause of action did not accrue in the year 1989, then, there was nothing on the record to show or suggest that the plaintiffs were restrained on a particular date or they were dispossessed on a particular date. The defendant, being aggrieved by the said judgment and decree is before this Court.

8. Mr. N.V. Gandhi, learned counsel for the appellant submits that the presumption relating to possession is backward and forward. If a particular person is in possession and the possession is exclusive, then, unless otherwise proved to the satisfaction of the court, it would be presumed that he continued to be in possession. According to him, if the plaintiffs have failed to prove the accrual of the cause of action, then, there is nothing on

the record to show or suggest that on a particular date, the defendant tried to oust the plaintiffs. He also submits that even assuming that the case of the defendant that there had been a partition of the joint family property is disbelieved, then too, injunction of the present nature cannot be granted specially when the plaintiffs have failed to prove, firstly, the cause of action and secondly, on what particular date, the defendant denied their title or right to enter upon. He submits that in accordance with Section 41[h] of the Specific Relief Act, 1963, the plaintiff would not be entitled to grant of any injunction if he is entitled to a better and further relief. According to him, in the present case, instead of filing a suit on a concocted cause of action, the plaintiffs could always file a suit for partition of the entire property, but they had very cleverly filed the present suit for one survey number to avoid mixing of the other joint family properties in the hotchpot. He also submits that the present suit in its form was

not maintainable.

9. Mr. R.S. Sanjanwala, learned counsel for the respondents-plaintiffs submits that even if the plaintiffs had failed to prove accrual of the cause of action, the fact remains that the property in exclusive possession of the defendant is joint family property and in absence of a partition, each person would be entitled to enter upon the land, share usufruct and none can claim exclusive possession. His further submission is that ordinarily, a person in exclusive possession cannot be dispossessed, but the said rule is an exception in cases of joint family property specially when one person in possession starts asserting ouster of the others. His further submission is that the suit was maintainable even if the plaintiffs have failed to prove the accrual of cause of action. According to him, the cause of action in the present case is denial made by the defendant in accepting the plaintiffs' right, and, under the circumstances, if a particular date pleaded by the plaintiff as cause of action could not be

proved, then too, the suit would be maintainable.

10. So far as the facts are concerned, at this stage, there is no dispute that the father had died on 8.4.79, the present suit came to be filed in the year 1989 at the instance of the plaintiffs with a submission that on the date well described in the plaint, cause of action accrued in their favour. The trial court recorded as a fact, that too, after appreciating the facts and the legal position that the plaintiffs miserably failed in proving the accrual of the cause of action. In the absence of a cause of action, one would not be entitled to file a suit. “Cause of action” though is not defined anywhere, but would include within its sweep bundle of facts which persuade or require a particular party to come to the court and seek a particular relief. If the bundle of facts provides a reason to a particular party to come to the court, then, the court would hold that he has a cause of action and then, the court shall proceed to decide the

dispute. In a given case, if the court holds that there is no cause of action in favour of a particular party, then, such a party would not be entitled to come to the court and say that though there is no cause of action, but he is still entitled to the relief from the court. The cause of action is the starting point which ignites the fuse, and ultimately leads to the final outcome. In the present case, the learned first appellate court did not consider this important aspect. If the finding remains as it is, then, the plaintiffs' suit would not be maintainable.

11. I pointedly asked Mr. Sanjanwala, learned counsel for the respondents that if the cause of action projected by them is not relied upon by the court, then, what would be the substituted cause of action and on what particular date, the defendant restrained them from entering upon the land, Mr. Sanjanwala, with his usual fairness, submitted that if that cause of action goes, the plaintiffs have other any alternative cause of action.

12. The first appellate court appears to have been persuaded by the fact that the property was joint and therefore, in absence of a partition or family arrangement, everybody would be entitled to enjoy everything. This understanding of the learned first appellate court would have been justified in case there was a cause of action. In the present matter, the defendant had come to the court with the defence that immediately after the father's death, there had been partition and in the said partition, survey no. 1086 came to his exclusive possession. Assuming for a minute that partition by metes and bounds could not be proved by the defendant, but that would not provide a cause of action in favour of the plaintiffs. The plaintiffs would still be required to say that on what particular date, the defendant tried to oust them or on what particular date, he asserted his exclusive rights in the property. In the present matter, the plaintiffs failed on both the counts.

13. The first appellate court had also not taken into consideration the conduct of the

plaintiffs. On one side, the plaintiffs were suggesting that there had been no partition by metes and bounds, but at the same time, they were suppressing the material facts regarding other property which was available for partition.

14. In the present matter, provisions of Section 41[h] of the Specific Relief Act in their juxtaposed reading with Section 38 of the Act would strictly apply as the plaintiffs who were entitled to relief of partition did not ask for it. The legal position now would be that the plaintiffs who concocted or manufactured the cause of action for injunction were in fact required and obliged to ask for partition. In special circumstances, the court can treat a suit for injunction to be a suit for partition, but in the present case, when the parties are making submissions that there had been partition or family arrangement and specially when the plaintiffs say that other parcels of land were partitioned and some property was given to each of them, then, it would not be proper on my part

to convert the suit into a suit for partition. The plaintiffs were obliged to file a suit for partition, which, in fact, they did not.

15. Taking into consideration the totality of the circumstances, I hold that the plaintiffs' suit for injunction simpliciter was not maintainable and the plaintiffs were required to file a suit for partition.

16. The questions are decided in favour of the defendant. The appeal deserves to and is accordingly allowed. No costs. The judgment and decree granted by the learned first appellate court are set aside and those of the learned trial court are restored.

17. If the law still permits the plaintiffs to file a suit for partition, then, they may go for it. Let a decree be framed accordingly. In view of the disposal of the Second Appeal, Civil Application No. 614 of 2005 stands disposed of.

[R.S. GARG, J.]

pirzada/-